
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>89-10203</u>
EDWARD CARVER)	
)	
Debtor)	
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)	
EDWARD CARVER)	
)	
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>89-1043</u>
PAULETTE CARVER)	
JASPER L. TOOLE, III)	Filed
FRAMPTON W. TOOLE, III)	at 11 O'clock & 35 A.M.
RICHARD L. PEARCE)	Date: 6-13-90
d/b/a TOOLE & TOOLE LAW OFFICES)	
)	
Defendants)	

ORDER ON MOTION FOR SUMMARY JUDGMENT

Plaintiff debtor, Edward Carver, debtor in the underlying Chapter 13 proceeding (hereinafter referred to as "debtor"), brought this action against defendants Paulette Carver, Gasper L. Toole, III, Frampton W. Toole, III, and Richard L. Pearce alleging that the defendants violated the automatic stay provisions of 11 U.S.C. §362(a) by proceeding with a contempt action against the debtor with knowledge of the debtor's pending Chapter 13 proceeding. The defendants filed responsive pleadings and filed a motion for summary

judgment under the provisions Bankruptcy Rule 7056 and Federal Rule of Civil Procedure 56.¹ After considering the record and arguments of counsel, the court makes the following findings of fact and conclusions of law on the motion for summary judgment

FINDINGS OF FACT

1. On September 15, 1987, defendant, Richard L. Pearce, an attorney licensed to practice law in the State of South Carolina, filed on behalf of defendant, Paulette Carver, an action in the Family Court of the Second Judicial Circuit in Aiken County, South Carolina, naming debtor as the defendant. The action sought among other things, legal separation between Mrs. Carver and debtor, child support and child custody.

2. On September 25, 1987, the Family Court in South Carolina entered an order granting Mrs. Carver custody and child support, and the use and possession of the marital home, but required debtor to pay the monthly mortgage payment on the home. Debtor failed to make the monthly mortgage payments, and foreclosure proceedings were begun against the property by the mortgage holder.

¹Debtor has requested in his brief in opposition to the defendants' motion that summary judgment be entered for him and against the defendants on the issue of liability. However, a request for summary judgment in a reply brief to the court is procedurally defective. See Bankruptcy Rule 7056; S.D. Ga. Local R. §I, R. 6.6.

3. Mrs. Carver amended her complaint in the Family Court on December 10, 1987, to seek temporary and permanent alimony payments from the debtor. Defendant Pearce, as the attorney for Mrs. Carver, and plaintiff's counsel in the South Carolina action, C. LaVaun Fox, submitted a consent order which was entered by the Family Court in South Carolina requiring the debtor to bring the mortgage on the marital home current by December 23, 1987. The order provided that if the debtor failed to bring the mortgage current and maintain it, he could be held in contempt of court.

4. The debtor failed to make the mortgage payments for February and March, 1988, and defendant Pearce on behalf of Mrs. Carver, brought a motion in the Family Court in South Carolina seeking to have the debtor held in contempt of court. On March 25, 1988, the Family Court entered an order holding that the debtor was not in contempt, but directing him to bring the mortgage current by April 1, 1988.

5. On October 20, 1988, the Family Court in South Carolina entered a final order granting a total divorce between the parties and awarding the marital home to Mrs. Carver. The final order also required the debtor to forward to Mrs. Carver within ten (10) days of the due date, the amount of the monthly mortgage payment for Mrs. Carver to forward to the mortgage company.

6. On February 10, 1989, debtor filed for protection under Chapter 13 of the Bankruptcy Code in this court.

7. On March 10, 1989, defendant Pearce filed another motion on behalf of Mrs. Carver seeking to have debtor held in contempt for his failure to make the monthly mortgage payments. The same day, defendant Pearce attended on behalf of Mrs. Carver, a hearing in the Court of Common Pleas of Aiken County, South Carolina regarding the foreclosure on the marital home.

8. On March 13, 1989, the Master-in-Equity of the Court of Common Pleas of Aiken County, South Carolina received notice that debtor had filed a petition in bankruptcy and entered an order striking the foreclosure proceeding with leave to restore. On the same day, defendant Pearce learned of debtor's bankruptcy proceeding as he received a copy of the first page of the plaintiff's petition from the Court of Common Pleas in South Carolina.

9. On March 23, 1989, the contempt action brought by defendant Pearce on behalf of Mrs. Carver came up for hearing before the Honorable Peter R. Nuessle, Judge of the Family Court in South Carolina. Defendant Pearce appeared at the hearing on behalf of Mrs. Carver and informed the court of debtor's pending bankruptcy petition, but added in his remarks to the court,

Your Honor, of course, in the normal scheme of things bankruptcy does stay proceedings. However, in bankruptcy that does not apply to matters involving Family Court and child support payments. Defendant Pearce also stated to the court at that hearing, They are taking steps to foreclose this

property, your Honor. We have a final hearing

before the Master-in-Equity. so once the property is released, it will be a very short period of time in which the property will be sold.

Debtor appeared at the hearing without counsel and requested a continuance to seek an attorney.

10. At the conclusion of the hearing, Judge Nuessle held the debtor in contempt of court and sentenced him to six months in jail which would be suspended upon the payment by the debtor of all arrearages and charges. The order also required the debtor to pay within sixty (60) days all attorney fees and costs incurred by Mrs. Carver in the contempt action. A bench warrant was entered ordering the immediate arrest of the debtor.

11. Debtor was jailed for approximately two (2) weeks and was forced to borrow money from friends and relatives in the amount of Seven Thousand One Hundred Twenty-Four and 48/100 (\$7,124.48) Dollars to cure the mortgage arrearages and pay all attorney fees and costs in order to regain his freedom.

12. Defendants Gasper L. Toole, III and Frampton W. Toole, III are law partners with defendant Pearce doing business as Toole and Toole Law Offices.

CONCLUSIONS OF LAW

In considering a motion for summary judgment, "[t]he moving party bears the burden of demonstrating the absence of a

dispute as to any material fact and of showing that he or she is entitled to a judgment as a matter of law." Cowan v. J.C. Penney Co., 790 F.2d 1529, 1530 (11th Cir. 1986). "The court must view the evidence in the light most favorable to the party opposing the motion." Id. See also Bankruptcy Rule 7056; Fed. R. Civ. P. 56. In applying this standard the court finds that the defendants have failed to establish that they are entitled to a judgment as a matter of law.

The facts set forth above are not disputed by the parties. The issues in dispute are over the legal interpretation of the automatic stay provision of 11 U.S.C. §362(a),² Defendants

²11 U.S.C. §362(a) provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), operates as a stay applicable to all entities, of-

(1) the commencement or continuation including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before

maintain

that the stay of §362(a) is not applicable to the collection of alimony, maintenance, or support. Additionally, the defendants contend that the Family Court of Aiken County, South Carolina held the debtor in contempt of court, not the defendants.

The stay of section 362(a) applies to actions to collect alimony or support payments due from the debtor at the time of or prior to the debtor's filing for protection under the bankruptcy code unless such collection actions are directed against property which is not property of the estate. 11 U.S.C. §362(b)(2).³ The

the commencement of the case under this title;

(3) any act to obtain possession of property of the estate of property from the estate or

to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

³11 U.S.C. §362(b)(2) provides:

(b) The filing of a petition under section 301, 302, or 303 of this title,

exception in §362(b)(2) is narrowly drawn to apply only to actions to collect alimony, maintenance, or support from property that is not property of the estate.

A chapter 13 proceeding creates a bankruptcy estate which consists of all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. §541(a)(1). The action brought by these defendants sought to have the debtor jailed or to have him cure the arrearages on the marital home from property of the bankruptcy estate. The automatic stay of 11 U.S.C. 362(a) applies to prevent such actions from being brought against debtors who have sought protection from their creditors under the Bankruptcy Code. See, Bible v. Bible (In re: Bible), 110 B. R. 1002 (Bankr. S. D. Ga. 1990). The action brought by these defendants was directed at the debtor and property of the estate to collect a prepetition debt, the past due payments on the marital residence.

The contention that the Family Court in South Carolina was responsible for holding the debtor in contempt of court and that the defendants were not responsible for the action is not

or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), does not operate as a stay -

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate.

supported by the law of South Carolina or the undisputed facts. The action brought by the defendants was an action for civil contempt. "Civil contempts are those quasi contempts which consist in failing to do

something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court while criminal contempts are all those acts in disrespect of the court or of its process or which obstruct the administration of justice, or tend to bring the court into disrespect, such as disorderly conduct, insulting behavior in the presence or immediate vicinity of the court, or acts of violence which interrupt its proceedings; also disobedience or resistance of the process of the court, interference with property in the custody of the law, misconduct of officers of the court"

Clamp v. Hall, 287 S.C. 270, 335 S.E.2d 815 (Ct. App. 1985 [quoting State v. Nathans, 49 S.C. 199, 207, 285 S.E. 52, 55 (1896)]). Sanctions for contempt may entail imprisonment, and the imprisonment is civil in nature when it is intended to coerce, rather than punish. Clamp, supra [citing Shillitani v. U.S., 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.E.2d 622, 627 (1966)]. See also Bible, supra at 1005.

The imprisonment of the plaintiff for failing to maintain the monthly mortgage payments on the marital home was intended to coerce him to cure the arrearages and make all future payments, not punish him for any of the previously enumerated

grounds for criminal contempt. The court provided for a suspended sentence upon payment of the arrearages. The action was brought by the defendants, carried to hearing by the defendants after they had knowledge of the debtor's bankruptcy filing, and urged by the defendants at hearing.

The defendants pressed the Family Court to hold the debtor in contempt of court. The transcript of the contempt hearing indicates that Mr. Pearce, on behalf of Mrs. Carver, continued to ask that the court hold the debtor in contempt even though he had knowledge of the plaintiff's bankruptcy proceeding. The action was an effort to force the payment of Mrs. Carver's claim through the sanctions of the Family court to the exclusion of the Federal Bankruptcy laws. See In re: Caldwell, 5 B.R. 740 (Bankr. W.D. Va. 1980).

The defendants also have objected to the affidavit of Wilhelmina Carver, the current spouse of the plaintiff. The court, however, finds that it need not consider the affidavit as the facts as set forth by the defendants do not support a granting of a judgment as a matter of law in their favor.

It is ORDERED that defendant's motion for summary judgment is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 13th day of June, 1990.